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In The SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 604

SAM E. MURRELL and MYRTLE H. MURRELL, his wife,

Petitioners,

versus

UNITED STATES OF AMERICA, 8.84 acres of land, more or less, situated in Brevard County, Florida et al,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

This brief in opposition to the petition for writ of certiorari is filed jointly in behalf of the respondents Stephen R. Magyar and Lieselott Magyar, his wife; Theodore A. Peterson and Olga M. Peterson, his wife; Donald L. Peterson and Dorothy Peterson, his wife; and Nina Youngblood, by their respective attorneys, Stephen R. Magyar and William D. Jones, Jr.

OPINIONS BELOW

These respondents concur in the statements made by the petitioners in this section.

JURISDICTION

These respondents concur in the statements made by the petitioners under this section. However, these respondents would show that the petitioners petitioned the Court of Appeals for extension of time in filing a petition for rehearing and after the said petition for rehearing was denied, the Court issued a stay of its mandate until 30 days from September 28, 1959, for the purpose of the petitioners filing their petition for writ of certiorari.

QUESTIONS PRESENTED

These respondents do not concur in the questions as set forth by the petitioners in that they are argumentative and not truly representative of the facts. Rather these respondents feel the question involved herein is as follows.

"Did the United States District Court and the United States Court of Appeals for the 5th Circuit err in applying the Law of Florida to the facts of this case?"

The subsidiary questions of law involved can be stated as follows:

a) When a parcel of land is subdivided, streets are shown on the plat, certain lots are shown facing the ocean, and a strip of land is marked "reserved for ocean boulevard and boardwalk", lots are sold according to the plat which was recorded in the public records, the area marked "reserved for ocean boulevard and boardwalk" is dedicated as a street.

b) The purchasers of lots abutting a street laid out wholly on the margin of the land subdivided obtain title

of their lot extended to the farthest edge of the street subject to easement of the public.

(c) When a street, boardwalk, or boulevard is lawfully vacated and abandoned, the title to the center of the street and in some cases, the entire street, is perfected in the abutting property owners free of all easements.

(d) A person, joining and consenting to a petition for the vacating and abandonment of a street marked "reserved for ocean boulevard and boardwalk", is estopped from later denying the existence of the original street.

RULE OF FEDERAL PROCEDURE INVOLVED

The respondents agree that Rule 56 as set forth by the petitioners herein is involved in this matter. However, respondents would also show that Florida Statutes, Section 177.08 is also involved herein, which among other things, states the following: " . . . excepted parcels must be marked "not included in this plat" . . . All land within the boundaries of the plat must be accounted for either by blocks, lots, out lots, parks, streets, alleys or excepted parcels. But no strip or parcel of land shall be reserved by the owner when recording a subdivision, unless the same is sufficient in size and area to be of some practical use or service."

STATEMENT OF THE CASE

These respondents do not concur with the statement of the case as presented by the petitioners in that the petitioners statement does not reflect the true facts of this matter. One important factor would be the reproduction of the plat of Dune Ridge Annex as it appears in the petition of the petitioners. The reproduction omits entirely the description of the land that it purports to cover and it omits entirely the owners certificate. The petitioners clearly omit that all of the respondents considered their property as ocean frontage property and that if petitioners claim of

no street was valid that they would have no access to the ocean." Further the petitioners do not show that the plat upon which they stress so much importance is merely a replat of a part of the Orlantic Subdivision which plat was before the District Court together with that of the Dune Ridge Annex.

These respondents would bring to this Court's attention the description of the property involved which clearly shows that Dune Ridge Annex is a replat of a part of Orlantic Subdivision as per page 60 of the record. These respondents would also bring to the Court's attention the owners certificate showing that the owners accept the survey and plat thereon and dedicate to the use of the public the street shown thereon as street, as per page 60 of the record.

These respondents would show that a true understanding of the issues involved in the Courts below can best be understood by a close examination of the facts and the proceedings which took place and are hereinafter described.

On August 5, 1924, the North half of the South 3/8 of section 24, Township 22 South, Range 37 East, located in Brevard County, was platted as the Orlantic subdivision and showed that block 9 was comprised of lots 1 through 11 facing the land in question marked "reserved for ocean boulevard and boardwalk" which abutted the high water mark of the Atlantic Ocean (R. 86). On January 21, 1925, the plattor conveyed lot 3 which by mesne conveyances became vested in Stephen R. Magyar, and wife (R. 87). On ..... the plattors conveyed lot 5 which by mesne conveyance vested in the Respondents, Theodore A. Peterson and Olga M. Peterson, his wife and Donald L. Peterson and Dora Peterson, his wife.

The respondent, Nina Youngblood, became vested of the

fee simple title of Lots 1 and 2 Block 9, Orlantic Subdivision, the lands designated as Tract No. 1140, by virtue of a tax deed issued to her which was dated August 7, 1944 and recorded on October 10, 1944, in Deed Book 263, page 305 of the public records of Brevard County, Florida (R 57) except that at the date of issuance of this tax deed the area lying eastward of Lots 1 and 2 Block 9 Orlantic Subdivision to the high water mark of the Atlantic Ocean was impressed with a dedication to public use as created by the plat of Orlantic Subdivision. The former holder of the record title to the lands designated as Tract No. 1140, Leslie J. Davidson, no longer has any interest in or claim against the title to Tract No. 1140. He was not named as a claimant of the title or as a defendant by the United States of America in either its Declaration of Taking R 1, 4) or its Complaint in Condemnation (R 11, 13, 14).

On October 31, 1925, the plattors by a deed conveyed R. 21-24) to Ryan and Roberts lands by metes and bounds description (R. 88), which allegedly included the entire Orlantic subdivision with the specific words that conveyed only "the unsold portion of all those certain lots, pieces, or parcels of land" and showed that lot 1, lot 2, lot 3 and lot 5 block 9 were excepted from the deed.

In February, 1931, Ida A. Ryan as trustee, Isabelle Roberts as trustee, and Adelaide Jackson, as secretary of Dune Ridge Annex Company, not incorporated, replatted lots 8, 9, 10, and 11 of block 9 of Orlantic subdivision together with portion of block 7 and block 8 into Dune Ridge Annex. The description was given in metes and bounds rather than by lots and blocks of the original subdivision. In this new subdivision the lands in question were marked, "reserved for Ocean boulevard and boardwalk", as in the original subdivision plat (R. 60).

On September 9, 1954, the owners of block 9, the Respondents, as owner of lots 1 through 7 inclusive of Orlantic subdivision, and Ryan and Roberts the predecessors in title to the petitioners, as owner of lot B of Dune Ridge Annex. acknowledge that the area marked "reserved for ocean boulevard and boardwalk" was dedicated as a road or street and petitioned the County Commissioners of Brevard County to vacate and abandon the said street. And a resolution was passed by the said County Commissioners vacating and abandoning the said street (R. 62-64).

The Respondents therein took possession and claimed title to that entire area adjacent to their lots marked as reserved by ocean boulevard and boardwalk.

Thereafter on May 20, 1955, Ryan and Roberts conveyed whatever land they had left in Dune Ridge Annex to the petitioners by metes and bounds description excepting therefrom all of the sold portions (R. 21-24).

From May, 1955 to the date of filing of answer by the petitioners herein the petitioners at no time made demand on the respondents for possession of the disputed lands nor at any time did they claim legal ownership, even though the respondents were using the said lands, and had improved some of the said lands (R. 90).

On September 6, 1957, the petitioners sold all the lands conveyed to them by Ryan and Roberts to the United States of America (R. 91) but are now contending that they did not sell this part of the street marked "reserved for ocean boulevard and boardwalk".

On February 7, 1958, the United States of America filed the declaration of taking and complaint in condemnation of the properties of the Respondents. The United States

of America in its Schedule A at no time showed the petitioners as a purported owner of any portion of tract 1141 (R. 5).

The respondents, Stephen R. Magyar and Lieselott Magyar, his wife, made a motion for partial distribution of funds as pertains to tract 1141 which the Court denied on the oral statements of the Assistant United States Attorney, Robert Nunez, that the petitioners were making or about to make some claim to the lands. The respondents, on advice of the Court, gave notice to the petitioners of their motion for partial distribution which resulted in the filing by the petitioners of their pleadings entitled, "Claim of Sam E. Murrell and Myrtle H. Murrell, his wife, to property and funds, including exhibits attached thereto" (R. 15).

The respondents, Stephen R. Magyar and Lieselott Magyar, and Theodore A. Peterson et al., filed motions for summary judgments (R. 37-39) and attached affidavits of the tax collector (R. 41) and tax assessor (R. 40) of Brevard County. In addition, the respondents filed the affidavits of Stephen R. Magyar (R. 47) in their motion for summary judgment. Subsequently, the other respondents filed their motions for summary judgment as well as the petitioners.

The summary judgment, after notice to all concerned and oral argument from all parties, and examination of the plats of Orlantic Subdivision and the Dune Ridge Annex, was entered in behalf of the respondents and against the petitioners.

The petitioners filed their designation of contents of record on appeal which excluded certain facts deemed essential by the respondents and thereupon an order was made allowing some of the excluded exhibits to be included in the record on appeal.

On February 3, 1959, the petitioners filed their appeal to the United States Court of Appeals for the Fifth Circuit. On August 12, 1959, the Court of Appeals affirmed the District Court and supported the summary judgment in favor of the respondents. The petitioners requested an extension of time for filing a petition for rehearing which was granted and after the petition for rehearing was filed, the Court of Appeals denied the petition on September 25, 1959. The Court of Appeals thereupon on petition of the petitioners stayed the mandate for a period of thirty (30) days from the denial of the petition for rehearing to allow the respondents to file their petition for certiorari.

Thereupon the petitioners filed their petition for certiorari on December 19, 1959.

ARGUMENT

Pursuant to Rule 19, the petitioner is requesting a review on writ of certiorari which is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefore.

Nowhere in the entire brief of the petitioner is there any showing which might fall under the special and important reason clause. The only portion applying thereto would be paragraph 9, page 19 of the petitioner's brief wherein he states that the decision in this cause and the opinion of the Court of Appeals affirming the said decision is in direct conflict with the applicable law of the State of Florida on an important State question. However, no showing is made as to which law it is in direct conflict.

The respondents feel further that this petition should be dismissed on the basis of the *Southern P wer Company* V. *North Carolina Public Service Compa y*, 44 Supreme

Court 164, 263 US 508 wherein it is stated that a petition to the United States Supreme Court for a writ of certiorari should make a clear, definite and complete disclosure concerning the controversy, since it is impossible for the Court critically to examine the record before ruling on the application and it must rely largely on preliminary papers.

The petition should be denied also on the basis of the *Galveston Causeway Construction Company* V. *Galveston, H and SA Railway Company*, 43 Supreme Court 503, 262 US 747 wherein it was stated that a petition for writ of certiorari to the former Circuit Court of Appeals would be denied when it contained no summary and no short statement of the matter involved and the general reasons relied on for its allowance, as required by the Supreme Court former rule 37, though the record contains 1000 pages.

The entire brief of the petitioners discloses no statement showing the basis upon which it is contended that this Court has jurisdiction to review the judgment. Nor is there any reason advanced for the allowance of the writ of certiorari.

The petitioner does not disclose that the questions involved herein are of importance to the public, but are only of importance to the parties involved.

The respondents respectfully suggest that the writ of certiorari should be denied on the ground that the argument and reasons advanced for the allowance of the writ discuss questions which are contrary to the questions presented in the initial part of the petition.

As was said in *Rogers* V. *Missouri P. R. Company* 1 L. ed 2d 515, the United States Supreme Court does not grant certiorari to review evidence and discuss specific facts. Ap-

parently from the entire arguments of the petitioners, they are requesting this Court to review the evidence and the facts. A close analysis of the brief of the petitioners may be summarized as follows:

a) Where the word "reserved" is used on a plat there is no intention to make a grant to the public and there is no dedication.

b) There must be a valid acceptance to effect a valid dedication.

c) Whether or not there is a dedication is a question of fact for a jury.

d) Fee title to streets remain in the Grantors despite dedication for when streets are vacated the entire fee reverts to the original Grantors.

e) That the Court of Appeals based its judgment on the dissenting opinion of *Caples versus Taliaferro*, 144 Fla. 1, 197 So. 861.

f) That since respondents did not buy land based on Dune Ridge Annex Subdivision, they cannot rely on the law regarding title to streets.

g) That the Court of Appeals affirmed a decision in direct conflict with the applicable law of the State of Florida on an important State question.

The respondents realize that the time of this Court is very valuable and should be used only on Questions of great public importance, which very clearly does not apply to this case. Therefore being mindful of the statement of this Court in *Brady V. U.S.A.*, 77 S. Ct. 910, 1 L ed 2d 1130, which is as follows:

"extensive research by counsel is not necessary to charge the understanding of the Supreme Court adequately on the gravity of an issue on which review by writ of certiorari is sought and to prove to the Court the appropriateness of granting a petition for the writ, *and this is especially so when the controlling ground on which the petition is based has been fully considered in the opinion of the District Court, and, on review, by the Court of Appeals.*" (emphasis supplied)

Briefly the respondents' main contentions were as follows:

1) The area on the plat of Orlantic Subdivision and of Dune Ridge Annex, marked "reserved for boardwalk and ocean boulevard" indicates a dedication by the original plattors of the area for street purposes.

2) When the respondents or their predecessors in title purchased their lots as ocean frontage and in reliance on the plat, that as to them, the dedication and acceptance was completed.

3) The general interpretation of the plat clearly shows that there was an intention to dedicate the area as a street.

4) The petitioners are estopped from denying that the area was a street, when in fact, their predecessors in title joined the respondents in applying to the County Commissioners of Brevard County, Florida, to vacate the area in question, which they admitted at that time was a street.

5) That the accepted law in Florida is that a purchaser who purchases a lot abutting a street in reliance on a plat gets a fee simple title to the middle of the street and in some cases, such as the case at issue, to the

farthest edge of the street, together with an easement in all the other streets and public places depicted on the plat.

6) When a part of a subdivision is replatted, the replat cannot destroy the 'vested' rights of owners of the balance of the original plat.

The respondents, in their brief to the Court of Appeals and in their oral arguments presented the detailed law to support their contentions. Some of the cases cited by the petitioners herein are used by the respondents to support their contentions.

The petitioners insist on invoking the law regarding dedication and acceptance *to the public* and disregard the law as pertains to purchasers of the subdivision and especially abutting property purchasers.

The petitioners ignore completely Section 177.08 of the Fla. Statutes which states, among other things, the following:

"***excepted parcels must be marked 'not included in this plat'***. All land within the boundaries of the plat must be accounted for either by blocks, lots, out lots, parks, streets, alleys or excepted parcels. But no strip or parcel of land shall be reserved by the owner when recording a subdivision, unless the same is sufficient in size and area to be of some practical use or service."

That there was a valid dedication in the case at issue is confirmed by *Walker* V. *Pollack*, (Fla.), 74 So. 2d 886 which is practically similar in all of the facts. There the Court stated that in a plat made in 1924 which contained an offer to dedicate streets, and lots were sold with that

offer in view and were purchased for a valuable consideration, the purchasers title went to the middle of the street and constituted and sufficiently gave rise to a valid presumption of an acceptance of the dedication. The case *McGourin V. DeFuniak Springs*, 51 Fla. 502, 41 So 541, the Court stated as follows:

> "Where the owner of the land makes a town plat thereof laying the same out into blocks and lots with intervening streets clearly indicated upon the plat separating the blocks and conveys lots with reference to such plats, he thereby evinces an intention to dedicate the streets to public use as such."

This is substantiated by 10 Fla. Jurisprudence 16, paragraph 16, entitled Dedications by plat.

As is stated in 10 Fla. Jurisprudence 22 and supported by many Florida cases such as *Smith V. Horn*, 70 Florida 484, 70 So. 435; *New Fort Pierce Hotel Company V. Phoenix Tax Title Corporation*, 126 Fla. 552, 171 So 525, purchasers of lots sold with reference to a plat acquire certain private rights in streets, alleys, parks and similar places appearing on the plat, which cannot be revoked and are not affected by a revocation of an offer to dedicate such places.

The petitioners make great effort to show that the word "reserved" is synonymous with "except". The respondents agree that the use of the word "reserved" on a map or plat may or may not, depending on the circumstances, indicate a dedicatory intention. This intention is one that may be obtained by an examination of the plat itself and the words used therein together with the law relating to plats.

As was stated in *Wilson V. Dunlap* (Fla.), 101 So 2d 801, if a plat is complete in itself, and free from ambiguity, it will control. Also in the interpretation of a plat, all doubts

as to the intention of the owner should be resolved most strongly against him; but the plat should be considered as a whole, and the makers real intention sought therefrom —and even such an indefinite expression as "the place", or the word "*reserved*" may operate in the light of the circumstances under which it is used to show a dedicatory intention. 8 R. G. L. 896 (1915 Ed). (*Fla. East Coast R. R. Co. v. Worley,* 49 Fla. 297, 38 So 618).

To support the contention of the respondents that where there is a sale of lots in reference to a plat, the title of the Grantees of the lots abutting on such streets, in the absence of a contrary showing, extends to the center of the street and in certain cases, to the farthest edge; 10 Fla. Jurisprudence 24, *Smith v. Horn;* 70 Fla. 484, 70 So 435, *New Fort Pierce Hotel Company v. Phoenix Tax Title Corporation,* 126 Fla. 552, 171 So 525; *Rawls v. Tallahassee Hotel Co.,* 43 Fla. 288 31 So 237; *Burns v. McDaniel,* 104 Fla. 526. 140 So 314; 49 A L R 2.

The petitioners make a point of stating that the respondents land was not a part of Dune Ridge Annex and therefore they cannot make claim to the abutting street. The petitioners seem to be willing to forget that the area they claim as their own was originally a part of the Orlantic Subdivision and that the rights of the respondents were vested in the abutting street prior to the replatting and their claim of title.

In conclusion the respondents would show that the law of Florida is clearly stated in the case of *Caples v. Taliaferro,* 144 Fla. 1 197 So 861 and the petitioners misinterpret the entire case. The petitioners rely considerably on the case of *Wilson v. Dunlap* (Fla.) 101 So 2d 801, and here again, the petitioners misinterpret the holding of this case and the differentiation of the facts involved.

No Constitutional or Statutory rights of the petitioners have been violated nor has there been a departure from established Florida law, and hence, it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, one of the attorneys for the respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of January, 1960, I served a full, true and correct copy of this brief in opposition to the petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in the above styled matter on the petitioners herein, by mailing such a copy in a duly addressed envelope to the counsel of record for petitioners by depositing same in a United States Post Office or mail box at Jacksonville, Florida, with first class postage prepaid, addressed to counsel of record for petitioners at their respective Post Office address as set forth below:

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